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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

THE PEOPLE OF THE STATE OF MICHIGAN,

PETITIONER

vs.

CLARENCE CARL BLACKBURN,

RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MICHIGAN

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QUESTIONS PRESENTED

I.

DOES IT VIOLATE A DEFENDANT'S CONSTITUTIONAL RIGHT AGAINST SELF-INCRIMINATION FOR A POLICE OFFICER WHO DISCOVERS A SHOOTING VICTIM TO ASK THE PEOPLE AROUND THE BODY "WHAT HAPPENED" WITHOUT FIRST WARNING THEM OF THEIR RIGHTS UNDER MIRANDA v ARIZONA?

II.

UNDER ARTICLE III OF THE CONSTITUTION OF THE UNITED STATES, MAY THIS COURT COMPEL A STATE COURT TO SUPPRESS AN OTHERWISE VOLUNTARY STATEMENT MERELY BECAUSE THE POLICE OBTAIN THE STATEMENT WITHOUT STRICT ADHERENCE TO A PROPHYLACTIC RULE DESIGNED TO INSURE THAT THE STATEMENT IS VOLUNTARY?

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THE PEOPLE OF THE STATE OF MICHIGAN,

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vs.

CLARENCE CARL BLACKBURN,

RESPONDENT

PETITION FOR A WRIT OF CERTIORARI

TO THE COURT OF APPEALS

OF THE STATE OF MICHIGAN

NOW COME the People of the State of Michigan, by John D. O'Hair, Prosecuting Attorney for the County of Wayne, Timothy A. Baughman, Deputy Chief, Civil and Appeals, and Jeffrey

Caminsky, Assistant Prosecuting Attorney, and pray that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of Michigan, entered in this cause on June 19, 1984, rehearing denied November 20, 1984, leave to appeal denied by the Michigan Supreme Court on May 24, 1985, one justice dissenting.

OPINIONS BELOW

The opinion of the Michigan Court of Appeals is reported at 135 Mich App 509; 354 NW2d 807 (1984), and appended below as Appendix A; the order of the court denying rehearing is unreported, and appended below as Appendix B. Michigan Court of Appeals Docket No. 70148. The order of the Michigan Supreme Court denying leave to appeal is unreported as yet, and appended below as Appendix C. Michigan Supreme Court Docket No. 75581.

STATEMENT OF JURISDICTION

The Michigan Court of Appeals entered judgment on June 19, 1984, and denied rehearing on November 20, 1984. The Michigan Supreme Court entered judgment on May 24, 1985. This Court's jurisdiction is invoked under 28 USC §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Article III of the United States Constitution provides, in pertinent part:

> §1. "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. . . .
>
> * * *
>
> §2. "The judicial Power shall extend to all cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority. . . ."
> ". . . .[T]he supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

The Fifth Amendment to the United States Constitution provides, in pertinent part, as follows:

> "No person shall. . . be compelled in any criminal case to be a witness against himself, nor deprived of life, liberty, or property, without due process of law. . . ."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, as follows:

> ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdictions the equal protection of the laws."

STATEMENT OF THE CASE

On November 9, 1982, a jury convicted Respondent of second-degree murder and felony firearm; on November 18, 1982, the trial court sentenced him to 10-to-20 years imprisonment for murder, and a two year consecutive sentence for felony firearm.

On August 26, 1982, while at his brother's house trailer, Respondent shot and killed S. R. Gentry. Susan Barron called for help, and

the police arrived on the scene shortly thereafter. Upon his arrival, and after making sure that no weapons were nearby, Police Officer James Hunt ordered all persons present to take seats, directing them to keep their hands on their laps, while he and other officers searched the immediate area for weapons. Shortly thereafter, a rescue unit arrived and began efforts to save Gentry's life.

Finding no weapons, Hunt asked whether anyone present had seen what had happened, and received no response. After the rescue unit took Gentry from the trailer, he told everyone remaining that they would have to stay on the premises until he "could obtain statements from them as to what happened. [He] then asked if anyone knew where the gun was that was involved and received no answer." At this point, Respondent stood up and said: "I'll save everybody a lot of trouble.

I'm the one that did it." Hunt then formally arrested him.

As officers took Respondent from the trailer to the police car, Officer Leonel Lopez heard Respondent twice repeat: "I'm the one who did it. I'm the one who shot him." And on the way to the police station, Officer Edward Watters heard Respondent say that "he'd shot the guy because he [ie, Gentry] was 'fucking' with him." Watters had said nothing to prompt the latter remark, and advised Respondent to say nothing further until they arrived at the police station and was formally apprised of his constitutional rights.

At the station, Officer Lopez booked Respondent and [another officer] advised him of his rights. As Lopez walked Respondent to his cellblock, the latter asked how Gentry was doing; when Lopez said that he did not know, Respondent said: "I hope the motherf----- dies."

At trial, Respondent testified in his own defense and admitted firing the shot that killed Gentry. However, he claimed that he fired in self-defense after Gentry -- a larger man -- refused to leave when requested, and physically assaulted him. There were no other eyewitnesses to the shooting; however, circumstantial evidence from other witnesses contradicted Respondent's version of events.

On appeal, the Michigan Court of Appeals reversed and remanded for a new trial, holding that the trial court committed reversible error in failing to suppress Respondent's prior conviction for carrying a concealed weapon. The court also held that the court erred in failing to suppress all statements that Respondent made to police before receiving his Miranda-warnings at the police stations, reasoning that since Respondent was

not free to leave the trailer, he was in custody for Miranda purposes. The court determined that "[c]ustody is the test required by the United States Supreme Court as a matter of federal constitutional law," and that "for the purposes of determining if a defendant is in custody, the degree of investigative focus is pertinent only to the extent that it contributes to a defendant's reasonable belief that he is not free to leave." Accordingly, the court ordered the statements suppressed on retrial.

Citing this Court's holdings in Berkemer v McCarty, 468 US ___; 104 S Ct ___; 82 L Ed 2d 317 (1984) and New York v Quarles, ___ US ___; 104 S Ct ___; 81 L Ed 2d 550 (1984), Petitioner moved for rehearing, which the Michigan Court of Appeals denied on November 20, 1984. On May 24, 1985, the Michigan Supreme Court denied Petitioner's timely application for leave to appeal.

REASONS FOR GRANTING THE WRIT

I.

IT DOES NOT VIOLATE A DEFENDANT'S CONSTITUTIONAL RIGHT AGAINST SELF-INCRIMINATION FOR A POLICE OFFICER WHO DISCOVERS A SHOOTING VICTIM TO ASK THE PEOPLE AROUND THE BODY "WHAT HAPPENED" WITHOUT FIRST WARNING THEM OF THEIR RIGHTS UNDER MIRANDA v ARIZONA.

In Miranda v Arizona, 384 US 436, 465; 80 S Ct 1602; 16 L Ed 2d 694; 10 ALR3d 974 (1966), this Court adopted rules and procedures designed to prevent the use of coerced confessions in court through means of "a protective device" which would insulate the accused from "the compelling atmosphere" which it viewed as an inherent part of custodial interrogation. The Court looked to the "unfamiliar atmosphere" of police custodial

interrogation, and determined that unless the police undertook to "afford appropriate safeguards at the outset of the interrogation," there was no way to insure that any statements obtained "were truly the product of free choice." Ibid, at 457. Thus, the Court ruled that the now-standard "warnings" to suspects in custody were now to be a prerequisite to admitting any statements obtained through interrogation into evidence in court, to help preserve the integrity of the adversarial process without "hamper[ing] the traditional function of police officers in investigating crime." Ibid, at 477.

As noted infra, there is a substantial question about this Court's Constitutional power to impose such a prophylactic rule on state courts. (See, Argument II). But in any event, the warnings which Miranda requires are simply the "adequate protective device" which this Court has chosen to employ to pro-

tect individuals from official compulsion, and "insure that statements made in [a] government-established atmosphere are not the product of compulsion." Miranda, supra at 466. And Miranda itself specifically exempts from its ambit brief, prearrest detentions which are for purposes of investigation:

> "General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding. It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement. In such situations the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily present." Ibid, at 477-478.

Recently, this Court has had occasion to refine the scope of its landmark holding in Miranda. In Berkemer v McCarty, 468 US ___; 104 S Ct ___; 82 L Ed 2d 317 (1984), this Court considered the applicability of Miranda in a case of a motorist stopped for a routine traffic violation. Analogizing the brief

detention of a traffic stop to a Terry-stop,[1] the Court concluded:

> "The comparatively nonthreatening character of detentions of this sort explains the absence of any suggestions in our opinions that Terry stops are subject to the dictates of Miranda. The similarly noncoercive aspects of ordinary traffic stops prompts us to hold that persons temporarily detained pursuant to such stops are not in custody for purposes of Miranda." Berkemer, supra at 82 L Ed 2d 335. See also, California v Beheler, ___ US ___; 103 S Ct ___; 77 L ed 2d 1267 (1983).

In this case, the record shows that the police did not -- and could not -- arrest Respondent as soon as they arrived on the scene, for they had nothing beyond a reasonable suspicion that one or more of the persons surrounding the body had knowledge of the circumstances of the shooting. Under this Court's holdings, the brief, prearrest detention of all persons on the scene did not

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[1] Terry v Ohio, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968).

constitute custody; and the general question asking "what happened" -- directed to all on the premises -- did not constitute custodial interrogation. Miranda v Arizona, supra; Berkemer v McCarty, supra. Yet the Michigan Court of Appeals, noting the police directive to those present not to leave until they had found out "what happened," held that such a directive placed Respondent "in custody for purposes of Miranda," for from that point he "could reasonably believe that he was not free to leave." People v Blackburn, 135 Mich App 509, 518; 354 NW2d 809 (1984). (See infra, pp 10a-11a).

Clearly, Michigan has misapplied the holdings of this Court. It is inherently unreasonable to require the police to give Miranda-warnings to everyone they meet at a crime scene, simply because one of them may actually be the culprit; such a requirement would merely discourage cooperation from

citizens in combatting crime, and bring the criminal justice system into further disrepute among those it is intended to protect. But Michigan is not the only state to misconstrue the thrust of this Court's pronouncements. In Commonwealth v Meyer, 488 Pa 297; 412 A2d 517, 521 (1980), the Pennsylvania Supreme Court, insisting that its standards conformed to the federal standards announced in Beckwith v United States, 425 US 341; 96 S Ct 1612; 48 L Ed 2d 1 (1976), held that "custodial interrogation does not require that the police make a formal arrest, nor that the police intend to make an arrest. Rather, the test of custodial interrogation is whether the individual being interrogated reasonably believes that his freedom of action is being restricted."

However, most jurisdictions have interpreted this Court's holdings differently. In United States v Rorex, 737 F2d 753, 755 (CA8,

1984), the Eighth Circuit noted that courts must look to the "totality of the circumstances" in determining whether the alleged "interrogation" has custodial facets extending beyond those incidentally coercive aspects involved in all instances of official questioning. Louisiana has recognized that Miranda protections are triggered only "when there has been a restriction of the person's freedom as to render him 'in custody,'" and declined to find such "custody" in circumstances where, "at the time of the questioning, the police were not even aware that a crime had been committed, but were merely trying to establish the facts. . . ." State v Carlise, 458 So 2d 1347, 1351 (La App, 1984). And Maine's Supreme Judicial Court has noted:

> "Interrogation must be distinguished from 'general investigation.' Evidence from the latter is admissible in the absence of Miranda warnings and include

> neutral impersonal requests for information and follow-up questions for the purpose of clarifying an ambiguous situation." State v Longley, 483 A2d 725, 730 (Me, 1984).

Thus, the primary question which this petition presents the Court is whether Michigan correctly construes this Court's holdings to require police to give Miranda-warnings to those present at a crime scene, before proceeding to ask them what happened -- Rorex, Carlise, and Langley notwithstanding. While Berkemer holds that they need not, that case involved a motorist and a routine traffic stop; and Michigan's holding appears to call into question Berkemer's application to serious felonies. In any event, Petitioner submits that the rule of law announced by the Michigan Court of Appeals is a triumph of doctrinal logic over common sense, and wholly inconsistent with common sense and the pronouncements of this

Court. As such, and because it relies upon federal law for its result,[2] it must not be allowed to stand.

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[2] While the Court of Appeals reversed on a state evidential issue related to impeachment, its holding on the admissibility of Respondent's statement is firmly based upon federal constitutional law. See, People v Blackburn, supra at 515-520; infra pp 5a-14a, 17a-18a. And since a retrial will either moot or foreclose the issue in the future, this Court has jurisdiction to review the federal question presented. South Dakota v Neville,, 459 US 553; 103 S Ct 916; 74 L ed 2d 748 (1983). See also, Michigan v Long, 463 US ___; 103 S Ct 3469; 77 L Ed 2d 1201 (1983).

II.

UNDER ARTICLE III OF THE CONSTITUTION OF THE UNITED STATES, THIS COURT MAY NOT COMPEL A STATE COURT TO SUPPRESS AN OTHERWISE VOLUNTARY STATEMENT MERELY BECAUSE THE POLICE OBTAIN THE STATEMENT WITHOUT STRICT ADHERENCE TO A PROPHYLACTIC RULE DESIGNED TO INSURE THAT THE STATEMENT IS VOLUNTARY.

A.

As Professor Grano has written in his article "Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy," ___ Northwestern Law Rev __ (1985), a prophylactic rule is one whose primary function is not to redress a violation of rights, but to ensure that such rights never come to be violated:

> "The primary characteristic that distinguishes a prophylactic rule from a true constitutional rule is that the former may be violated without violating the constitution....The emphasis will be on assuring that constitutional protections are honored, on assuring not just the vindication of constitutional rights but also the appearance of vindication." Grano, supra at 5.

The classic prophylactic rule of this type is this Court's holding in Miranda v Arizona, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694; 10 ALR3d 974 (1966). Moving beyond the traditional concepts of voluntariness, see, eg, Culombe v Connecticut, 367 US 568; 81 S Ct 1860; 6 L Ed 2d 1037 (1961), the Miranda Court shifted its focus from the due process concern of preventing the use of a coerced confession to finding "a protective device to dispel the compelling atmosphere" which the Court viewed as an inherent part of custodial interrogation. Miranda v Arizona, supra at 465. Ignoring the issue of factual voluntariness, the Court opted to "concern [itself]

primarily with this interrogation atmosphere and the evils it can bring," Ibid, at 456, noting:

> "In these cases, we might not find the defendants' statements to have been involuntary in traditional terms....In each of these cases, the defendant was thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures. The potentiality for compulsion is forcefully apparent...." Ibid, at 457.

However, in Harris v New York, 401 US 222, 224; 91 S Ct 643; 28 L Ed 2d 1 (1971), this Court held that statements legally "involuntary" under Miranda were nonetheless admissible to impeach the defendant, so long as their "trustworthiness. . . satisfies legal standards." And in New York v Quarles, ___ US ___; 104 S Ct ___; 81 L Ed 2d 550, 554 (1984) the Court held that "overriding considerations of public safety" may justify a police officer's failure to provide a suspect with Miranda-warnings, in limited circumstances. Neither case holds that truly involuntary

statements are admissible; rather, in both cases, this Court has recognized that it has elevated to preeminence concerns beyond the quest for truth -- or, for that matter, beyond the question of voluntariness in fact. This is only possible if Miranda announced a prophylactic rule, rather than a due process rule of constitutional dimension -- and one which law enforcement agencies may violate without violating the Constitution.

However, this Court has never considered the source of its authority to impose such prophylactic rules on the states. Article III of the United States Constitution grants this Court broad powers to review state and federal tribunals; however, under the Constitution, this Court's jurisdiction extends only to those cases, "in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority. . . ."

US Const, Art III, §2. It does not grant this Court general supervisory powers over the various state courts. Thus, while the Court may adopt burden-shifting mechanisms as a tool to aid in determining whether a constitutional violation has occurred -- eg, creating a rebuttable presumption that statements obtained in the absence of Miranda-warnings are involuntary -- adopting a conclusive presumption that violating a prophylactic rule violates the Constitution constitutes a judicially enacted amendment to the Constitution, which is beyond this Court's power. And once this Court recognized that not every Miranda-defective confession was involuntary in fact, it recognized that Miranda was wrongly decided -- for Miranda may require states to exclude as evidence of substantive guilt a confession obtained not by violating the Constitutional right of due process, but by

violating a right not itself "protected by the Constitution." Michigan v Tucker, 417 US 433, 444; 94 S Ct 2357; 41 L Ed 2d 182 (1974).

Miranda's flaw is its alchemistic transformation of the Fifth Amendment right against compulsory self-incrimination into a "right to remain silent" -- whence flows the misguided waiver doctrines that have come to dominate the law of confessions. However, this constitutes a fundamental misreading of the Fifth Amendment: The Fifth Amendment contains no right to remain silent, which may be knowingly, voluntarily, and intelligently waived; rather, the right is a right not to be compelled to speak, which is logically incapable of waiver.[3]

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[3] One making a voluntary statement simply consents to speak. He does not consent to be compelled to speak -- which would, in effect,

This Court has recognized similar principles in Fourth Amendment cases. In Schneckloth v Bustamonte, 412 US 218; 93 S Ct 2041; 36 L Ed 2d 854 (1973), this Court rejected the notion that consent to a search must be preceded by Miranda-type warnings in order to be voluntary, recognizing that the Constitution did not protect people from all searches, merely from unreasonable ones -- and that consent made the search reasonable. But the Court turned to the old body of Due Process confession cases for guidance in determining whether consent to a search was voluntarily given, Ibid, at 223-224, recognizing that the

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note 3 (cont) say to his interrogators: "I understand that I have a Fifth Amendment right against compulsory self-incrimination, but I wish to waive that right and be compelled to speak. Therefore, you may beat and torture me, in order to coerce a confession."

Constitution did not demand "a knowing and intelligent waiver in every situation where a person has failed to invoke a constitutional protection." Ibid, at 235. Thus, voluntariness is determined by considering the totality of circumstances facing the actor -- with demonstrated knowledge of his rights but one factor in the analysis.

Clearly, a similar analysis is all that the Constitution requires in the area of confessions as well, as Professor Grano has demonstrated in his article "Prophylactic Rules in Criminal Procedure, supra. While creating a rebuttable presumption of involuntariness in the absence of Miranda-warnings is well within the Court's power to help it assess claimed violations of the Constitution, it is beyond the power of the Court to create a conclusive presumption which may serve to exclude voluntary confessions from evidence

in a state court of law, for such a rule amends the Constitution by judicial fiat. Accordingly, from the prespective of its Constitutional powers, the wide scope this Court has given its Miranda holding is open to serious challenge, and this Court should grant review in order to consider the question.[4]

B.

In many respects, this Court's holding in Miranda reflected its dissatisfaction with using the cumbersome rubric of due process to evaluate the admissibility of a defendant's statements -- owing, in part, to the imprecision accorded the term "voluntary." See, Miranda v Arizona, supra at 507 (Harlan, J,

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[4] Petitioner anticipates the objection that this issue was not presented for resolution in the state court. However, Petitioner did note in its brief supporting the application to the Michigan Supreme Court that it reserved the right to raise the issue of "the

dissenting) and Culombe v Connecticut, supra at 604-605. See also, Grano, Voluntariness, Free Will, and the Law of confessions, 65 Virginia L rev 859, 860 (1979). In its proper context, Miranda emerges as a procedural expedient designed to spare courts from engaging in the juridical legerdemain needed to find just results from a host of conflicting facts -- a goal which the Court sought to accomplish through simple preemption. In practice, however, this approach has not succeeded, for "[d]espite the Court's intentions and efforts, Miranda has not resulted in extensive involvement by lawyers on behalf of suspects in actual interrogation situations,"

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[4]propriety of federal courts imposing prophylactic rules upon state courts for statements which are not otherwise involuntary." Moreover, state courts are powerless to review the remedies which this Court imposes for violations of the United States Constitution; thus, this petition is Petitioner's first opportunity to raise the issue in an appropriate forum.

McCormick, Evidence (3d Ed), §163, p 443 (1984). Even worse, courts must still conduct hearings into the nature and circumstances of defendants' statements -- except that such inquiries now involve a host of prophylactic rules and procedures whose intent and purpose was to prevent such inquiries in the first place. The net result is that courts now determine the volitional nature of a statement as an issue distinct from mere "admissibility" -- and cases still turn on the amorphous concept of voluntariness. Clearly, the Miranda experiment has not succeeded.

Therefore, Petitioner suggests that this Court consider adopting a new test for voluntariness, in an effort to return the Court to its proper constitutional moorings and solve some of the problems still confronting the law in the area of confessions. Taken from Professor Grano's article on Voluntariness, supra at 906, this test would ask:

> "whether a person of ordinary firmness, innocent or guilty, having the defendant's age, physical condition, and relevant mental abnormalities. . , and strongly preferring not to confess, would find the interrogation pressures overbearing."

This test would have the advantage of objectivity, and could apply in all circumstances -- unlike present concepts of voluntariness, which alter with the changing issues before the court. It would "identify a constitutional line beyond which freedom of choice may not be impaired," yet would "help identify situations in which reasonably firm individuals could resist the police interrogation pressures." Ibid, at 909. But its most attractive aspect is that it would free courts of the need to exclude voluntary confessions obtained in technical violation of Miranda, by providing a mechanism for assessing claims of coercion based on the facts of a given case, rather than on supposed derivative benefits of a prophylac-

tic expedient. Thus, adopting this test would render Miranda obsolete, even if Petitioner's Article III claim fails.

And since Respondent never claimed that his statement was involuntary in fact, this test would mandate admitting his statement in the case at bar.

CONCLUSION

WHEREFORE, Petitioner prays that this Court grant plenary review, reverse the Michigan Court of Appeals, and remand the cause for proceedings not inconsistent with this Court's opinion.

Respectfully submitted,

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Dated: July 9, 1985
JC/rh

APPENDICES

OPINION OF THE MICHIGAN COURT OF APPEALS

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

-v- July 19, 1984

CLARENCE CARL BLACKBURN,
Defendant-Appellant.

Docket No. 70148

BEFORE: Holbrook, Jr., P.J., Mackenzie, and Quinnell*, JJ.

PER CURIAM

Defendant was charged in the Wayne County Circuit Court with premeditated first-degree murder, MCL 750.316; MSA 28.548, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317; MSA 28.549. He was sentenced to serve a two

* Circuit Judge, sitting on the Court of Appeals by assignment.

years' imprisonment for the felony firearm conviction to be followed by a term of from 10 to 20 years' imprisonment for the murder.

The underlying facts may be briefly summarized. Defendant, while at his brother's residence, shot and killed S.R. Gentry. Defendant testified that Gentry refused to leave the trailer after being asked to do so but, rather, physically assaulted him. Defendant claimed that the shooting occurred in self-defense. Defendant's brother testified that he had asked Gentry to leave his place two or three times, but Gentry would not leave.

In rebuttal, the prosecution called three witnesses who testified that the deceased was a peaceful and law-abiding person.

Prior to trial, defense counsel moved to suppress his client's conviction for carrying a concealed weapon should his client testify. In denying this motion, the trial court said:

"Actually, if he was convicted for a C.C.W., it was punishable in excess of one year under the law. It doesn't make any difference whether it involves theft, dishonesty or false statement. If what we are talking about here, a previous conviction similar to the crime with which he is charged, now the Court would have to give it even greater consideration because it would increase his probability of his having committed this crime." (Emphasis added.)

As a result of this ruling, defense counsel elicited the fact of the prior conviction himself during direct examination of defendant.

The trial court clearly erred in weighing the similarity of the charged offenses to the previous conviction as a factor which weighed in favor of permitting impeachment with the prior conviction for carrying a concealed weapon. People v Baldwin, 405 Mich 550; 275 NW2d 253 (1979), People v Woods, 97 Mich App 197; 293 NW2d 762 (1980). In Baldwin, as here, defendant testified that he had stabbed the victim, but claimed that he acted in

self-defense. The trial court weighed the similarity of Baldwin's prior conviction to the charged offense in favor of allowing it to be used for impeachment purposes. The Supreme Court reversed, without discussion whether the error could be deemed harmless. We nonetheless believe that an error of the type committed here may be deemed harmless in an appropriate case. This is not such a case, however. Apart from defendant, there were no eyewitnesses to the shooting. The evidence that the homicide constituted murder and was not justifiable was significantly less than overwhelming.

Defense counsel brought out the fact of the prior conviction on direct examination. However, since this strategic decision was the result of the trial court's erroneous treatment as to the use of the prior conviction, this issue is not waived. People v Barker, 411 Mich 866; 306 NW2d 100 (1981).[1]

Defendant made various brief statements to the police. The first was given before defendant was informed of his rights pursuant to Miranda v Arizona, 384 US 426; 86 S Ct 1602; 16 L Ed 2d 694 (1966). Ecorse Police Officer James Hunt explained the circumstances under which this statement was made at the motion to suppress:

"Q. [By Mr. Prosecutor]: What did you do after you identified the people who were present [at the scene]?

"A. I saw who was present. From looking at the fellow on the floor, apparently to me, he had been shot. At least, I believed so. And the nature of the call had been a shooting. I immediately had the other people in the room take a seat on the couch and on a chair, after it had been checked for weapons, to make sure there were no weapons on the couch.

"Q. Did you find any weapon?

"A. No. I asked if anyone had seen what had happened and received no answer. By this time, the rescue unit arrived and firemen were in the room trying to do something with the fellow on the floor. Once they removed him from the trailer, I informed everyone in the trailer they would have to remain until I could obtain statements from them as to what happened. I then asked if anyone knew where the gun was involved and received no answer.

"[Defendant] stood up and said, 'I'll save everybody a lot of trouble. I'm the one that did it.'"

Defendant was then turned over to Officer Edward Watters to be transported to the police station for booking. Defendant made a second statement to Officer Watters under the following circumstances:

"Q. * * * And did you say anything to the Defendant after he was placed in your car?

"A. I had asked him if he had remembered me?

"Q. I see.

"A. I had been in the Detective's Bureau in plain clothes. This particular time, I was in uniform. I asked him if he remembered me.

"Q. And did he respond to that?

"A. Yes, he did.

"Q. What happened?

"A. We were driving to the station. We were in the area of Southfield and Jefferson.

"Q. How far was that away from the trailer where you picked the Defendant up?

"A. Approximately three minutes away. At that point, [Defendant] stated that he'd shot the guy because he was 'fucking' with him.

"Q. Those were his exact words?

"A. Yes.

"Q. Had you said anything to him, prior to that?

"A. Not with regard to the shooting, no, sir.

"Q. What happened after he made that statement?

"A. I advised Mr. Blackburn [sic] not to say anything until we got to the station. Then he could be advised of his rights if he wants to make a statement. At that time, he can.

"Q. Was anything else said to Mr. Blackburn enroute to the station?

"A. No, sir."

Police officer Leonel Lopez actually booked defendant. Lopez stated that before defendant was placed in Officer Watter's care, defendant twice said, "I'm the one who did it. I'm the one who shot him." At the time of the booking, defendant was advised of his Miranda rights. In Officer Lopez's words,

the following then happened:

"Once that was done, I walked [Defendant] to a cellblock. Then he asked me, 'How's he doing?' I told him, 'I don't know. I haven't been out there,' meaning, the hospital. He says, 'I hope the mother --F dies.' That was the last I had talked with [Defendant]."

Defendant asserts on appeal that his first statement must be suppressed because it was given without benefit of Miranda warnings and that each of his subsequent statements must be suppressed as the fruit of the poisonous tree.

To resolve this issue, we must first determine whether defendant was in custody such that he should have been given Miranda warnings prior to Officer Hunt's initial inquiry of "what happened."[2] Custody arises when defendant's freedom of action has been deprived in a meaningful way. People v Belanger, 120 Mich App 752, 762; 327 NW2d 554 (1982). To determine whether a defendant was in custody at the time of interrogation, the

totality of the circumstances must be examined. The key question is whether the defendant could reasonably believe that he was not free to leave. See e.g., United States v Hall, 421 F2d 540, 544-545 (CA 2, 1969). If so, that defendant is in custody.

On appeal, the prosecution notes that Officer Hunt had not focused his suspicions on any one of the four people in the trailer at the time he asked, "what happened" and, as such, argues that he was not required to give Miranda warnings. However, we agree with the Vermont Supreme Court's holding in State v Hohman, 392 A2d 935, 940 (Vt, 1978), that, for the purposes of determining if a defendant is in custody, the degree of investigative focus is pertinent only to the extent that it contributes to a defendant's reasonable belief that he is not free to leave. In this case, as Officer Hunt specifically told defendant and the other persons in the trail-

er that they could not leave until they gave statements concerning what happened, it is manifest that defendant was in custody for purposes of Miranda.[3] Cf. Commonwealth v Meyer, 412 A3d 517; 488 Pa 297 (1980) [statement given by defendant to state police officer after being asked "what happened" ruled inadmissible where defendant had been required to stay at the scene by local police officer to wait for state trooper and where defendant was not advised of his rights under Miranda before questioning by state police].

The prosecution also relies heavily on People v Herman Jackson, 37 Mich App 664; 195 NW2d 312 (1972). There, this Court held that defendant's statement in response to the officer's question "what happened" was admissible. However, as defendant on appeal notes, unlike the situation in Herman Jackson, here, defendant was specifically told that he could not leave until he gave a statement. Since

the crucial issue is whether the defendant reasonably believed he was free to leave, this distinction mandates a different result than that reached in Herman Jackson. Thus, defendant's initial admission that he shot the deceased should have been suppressed.

We now turn to whether any of the other statements must be suppressed as the fruit of the poisonous tree. Issues involving the suppression of statements as tainted by antecedent police misconduct usually arise via a claim that an illegal arrest has tainted a subsequent confession. See, e.g., People v Martin, 94 Mich App 649, 653-654; 290 NW2d 48 (1980). In our opinion, the same basic question posed in Martin-type cases must be resolved here, i.e., was there any casual connection between the illegality or misconduct (here, the failure to give Miranda warnings) and the subsequent statements. See, Martin, supra.

Utilizing this approach, we conclude that all of the statements given by defendant before he was given Miranda warnings must be suppressed. The time span between the initial statement given without benefit of Miranda warnings and the statements on the way to, and in, the patrol car was slight. Although these subsequent statements were not the product of interrogation but, rather, were volunteered, defendant, having already admitted to the shooting, could well have believed that it was pointless not to speak freely. As defendant had not been given Miranda warnings before these statements were made nor had the police advised him not to say anything further at this time, we find that there was a causal connection between the initial failure to give Miranda warnings and the pre-booking statements.

As to the last statement (i.e., defendant's professed hope that the deceased would

die), this was volunteered by defendant after he was given Miranda warnings. We find these circumstances (the volunteered nature of the statements after receiving warnings) sufficient to break any causal connection between the initial failure to give Miranda warnings and the last statement. As such, the last statement was admissible.

We need not decide whether the erroneous admission of defendant's statements constituted harmless error as we are specifically reversing on the lower court's handling of defendant's motion to suppress his prior conviction for carrying a concealed weapon for impeachment purposes.

Defendant also argues that he was deprived of his constitutional right to due process of law because of the denial of his motion for funds to hire an investigator who could possibly locate witnesses able to testify about the deceased's violent and aggressive charac-

ter. In making this argument, defendant relies heavily on Mason v Arizona, 504 F2d 1345 (CA 9, 1974). However, under Mason, "such assistance is not automatically mandatory but rather depends upon the need as revealed by the facts and circumstances of each case." Id., 1352. In our opinion, the trial court did not abuse its discretion in finding that a sufficient showing of need for the investigator had not been made in this case.

Defendant's contention that the magistrate abused his discretion by binding defendant over on a charge of first-degree murder is rendered moot because he was actually convicted of second-degree murder and thus acquitted of first-degree murder. Of course, on retrial, defendant will be facing a charge of second-degree, and not first-degree murder.

Reversed and remanded.

/s/ Donald E. Holbrook, Jr.
/s/ Barbara B. MacKenzie
/s/ Edward A. Quinnell

FOOTNOTES

[1] Defendant also contends that application of the relevant criteria set forth in People v Crawford, 83 Mich App 35, 39; 268 NW2d 275 (1978), precluded use of the conviction for impeachment. While we do not reverse on this basis, it is difficult to see how proper application of the Crawford factors could support the use of the carrying a concealed weapon conviction in this case. In any event, the trial court is cautioned that, pursuant to MRE 609(a)(2), it must articulate on the record the factors which it considered in determining that the conviction is admissible for impeachment purposes.

In this regard, we note our disagreement with the trial court's opinion that, because carrying a concealed weapon is punishable by more than one year in prison, it "doesn't make any difference whether it involves theft, dishonesty of false statement." While

MRE 609(a)(1) permits use of defendant's conviction for impeachment purposes solely because it was punishable by more than one year's imprisonment, in determining whether discretion should be exercised to allow this impeachment, it always makes a difference whether the conviction involves theft, dishonesty or false statement. Convictions for offenses involving dishonesty obviously are more probative of a defendant's credibility than convictions for offenses which involve no elements of dishonesty.

[2] We acknowledge that the members of this Court continue to disagree over whether, as a general rule, Miranda warnings must be given when the police investigation focuses on one person or whether Miranda warnings need only be given to a defendant who is in custody. See e.g., People v Wallach, 110 Mich App 37, 47-50; 312 NW2d 387 (1981), vacated on other grounds 417 Mich 937; 332 NW2d 730 (1983).

This case is unusual, however, in that defendant was clearly not the focus of the investigation when he was asked, "what happened", although as we discuss, infra, he was in custody. Normally, the focus test works in the defendant's favor. To the extent that, in a particular case, the custody test works to the defendant's advantage, it must be applied. Custody is the test required by the United States Supreme Court as a matter of federal constitutional law, and the states must, in every case, apply a standard which is at least as protective of the individual's federal constitutional rights as is required by the United States Supreme Court.

[3] It should also be noted that, until Officer Hunt said that everybody would have to remain on the scene until he could get statements, he got no response to any of his inquiries. The compulsion of detection, then, was actually necessary to get defendant to talk.

ORDER OF THE MICHIGAN COURT OF APPEALS

AT A SESSION OF THE COURT OF APPEALS OF THE STATE OF MICHIGAN, Held at the Court of Appeals in the City of Lansing, on the 20th day of November in the year of our Lord one thousand nine hundred and eighty-four.

Present the Honorable

Donald E. Holbrook, Jr.

Presiding Judge

Barbara B. MacKenzie

Edward A. Quinnell

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

No. 70148

v

L.C. No. 82-275633

CLARENCE CARL BLACKBURN,

Defendant-Appellant.

In this case an application for rehearing is filed by plaintiff-appellee, and an answer in opposition thereto having been filed, and due consideration thereof having been had by the Court,

IT IS ORDERED that the application for rehearing be, and the same is hereby DENIED for lack of merit in the grounds presented.

STATE OF MICHIGAN--ss.

I, Ronald L. Dzierbicki, Clerk of the Court of Appeals of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court of Appeals at Lansing, this 27th day of November (seal) in the year of our Lord one thousand nine hundred and eighty four.

/s/Ronald L. Dzierbicki

Chief Clerk

ORDER OF THE MICHIGAN SUPREME COURT

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 24th day of May in the year of our Lord one thousand nine hundred and eighty-five.

Present the Honorable

G. MENNEN WILLIAMS,

Chief Justice

CHARLES L. LEVIN,

JAMES L. RYAN,

JAMES H. BRICKLEY,

MICHAEL F. CAVANAGH,

PATRICIA J. BOYLE,

DOROTHY COMSTOCK RILEY,

Associate Justices

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

SC: 75581

v

COA: 70148
[135 MA 509]
LC: 82-275633

CLARENCE CARL BLACKBURN,

Defendant-Appellee.

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this court.

The Motion for bond is also considered, and it is DENIED.

Boyle, J., dissents and states as follows:

I would grant leave to appeal in order to consider the issue of whether a prior conviction admitted for impeachment must have some additional relationship to credibility and of

whether as a matter of law such a prior conviction is so similar to a felony-firearm charge that the prejudicial impact of its admission into evidence outweighs its probative value.

STATE OF MICHIGAN--ss.

I, CORBIN R. DAVIS, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at

(seal) Lansing this 24th day of May in the year of our Lord one thousand nine hundred and eighty-five.

/s/ Corbin Davis ..... Clerk